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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

NATIONAL RAILWAY LABOR CONFERENCE,
Petitioner,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION BY THE NATIONAL RAILWAY LABOR CONFERENCE FOR WRIT OF CERTIORARI

RICHARD T. CONWAY
(Counsel of Record)
RALPH J. MOORE, JR.
EUGENIA LANGAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

DAVID P. LEE
Vice Chairman and
General Counsel
NATIONAL RAILWAY LABOR
CONFERENCE
1901 L Street, N.W.
Washington, D.C. 20036
(202) 862-7218

Attorneys for the National Railway Labor Conference

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QUESTIONS PRESENTED

Under § 2 Ninth of the Railway Labor Act, representatives of crafts or classes of employees are certified on a system-wide basis. Pre-existing certifications issued on carriers that are merged or consolidated may no longer reflect the choice of a majority of the employees in the applicable craft or class of the merged carrier or system, as § 2 Fourth of the Act requires. The National Mediation Board adopted procedures to assure compliance with § 2 Fourth, under which a carrier notifies the Board of a merger and the Board, if it determines after an investigation that a merged system exists, determines the representative (if any) chosen by a majority of the employees in each system-wide craft or class. The Board subsequently applied those procedures on the Burlington Northern Railroad to make such determinations.

1. Particularly in view of the decisions in *Switchmen's Union* v. *Board,* 320 U.S. 297 (1943), and *Railway Clerks* v. *Employees Assn,* 380 U.S. 650 (1965), are the merits of those procedures reviewable by the courts either directly or as applied on the Burlington Northern?

2. If the merits of those procedures are reviewable, does the Railway Labor Act prohibit the National Mediation Board from adopting or applying procedures under which the Board in its discretion may, upon request by a carrier or *sua sponte,* investigate whether a merger has occurred or will occur and, if so, determine who are the representatives of the merged system-wide crafts or classes chosen by the majority of the employees in each such craft or class?

LIST OF PARTIES BELOW

The parties to the proceeding in the court of appeals at the time of the decision below were as follows:

Appellees

National Mediation Board
National Railway Labor Conference
Burlington Northern Railroad Company

Appellants

American Train Dispatchers Association
Brotherhood of Locomotive Engineers
Brotherhood of Maintenance of Way Employes
Brotherhood of Railroad Signalmen
Hotel Employees and Restaurant Employees International Union
International Association of Machinists and Aerospace Workers
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers
International Brotherhood of Electrical Workers
International Brotherhood of Firemen and Oilers
International Longshoremen's Association
National Marine Engineers' Beneficial Association
Seafarers International Union of North America
Sheet Metal Workers' International Association *

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* American Railway and Airway Supervisors Association, Brotherhood of Railway Carmen, Transportation•Communications International Union, Transport Workers Union of America, and United Transportation Union appealed the decision by the District Court but withdrew their appeals.

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PETITION BY THE NATIONAL RAILWAY LABOR CONFERENCE FOR WRIT OF CERTIORARI

Petitioner National Railway Labor Conference ("NRLC") respectfully requests the Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, *en banc*, in this case.*

OPINIONS BELOW

The Opinion for the Court of Appeals (Edwards, J.), *en banc*, the concurring opinion (Randolph, J.), and the dissenting opinion (Williams, J.), issued on July 19,

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* Pursuant to Rule 29.1, the NRLC states that it is an unincorporated association and has no subsidiaries or affiliates.

1994, are reported at 29 F.3d 655, and are set forth in App. A hereto. An Order, issued *sua sponte* by the Court on July 20, 1994 (App. B), amended the opinion for the Court and the dissenting opinion to note that Judges Silberman, Douglas Ginsburg, and Henderson joined the dissent so that the decision was by a 5 to 4 majority of the *en banc* Court. The March 9, 1993 opinion for the panel (Ruth Bader Ginsburg, J.), together with a concurring opinion (Edwards, J.) and a dissenting opinion (Williams, J.), vacated when the Court granted a rehearing *en banc*, are reported at 988 F.2d 133, and are set forth in App. C.

The unreported June 10, 1991 Memorandum Opinion and Order by the District Court dismissing the Complaint in Civil Action No. 89-3306 is set forth in App. D. The unreported July 3, 1991 Order by that Court denying plaintiffs' motion to alter or amend judgment is set forth in App. E. The decision of the National Mediation Board ("NMB" or "Board") in *Procedures for Handling Representation Issues, Resulting from Mergers, Acquisitions or Consolidations in the Railroad Industry*, 17 N.M.B. 44 (Nov. 27, 1992), is set forth in App. F. The unreported September 12, 1991 Order by the District Court dismissing the Complaint in related Civil Action No. 91-1135 is set forth in App. G. The decision of the NMB in *Burlington Northern Railroad Co.*, 18 N.M.B. 240 (Apr. 23, 1991) is set forth in App. H.

JURISDICTION

The judgment of the Court of Appeals following rehearing *en banc* was entered on July 19, 1994. No petition for rehearing was filed. The NRLC's time in which to file this petition was extended to and including November 16, 1994 by an Order of the Chief Justice dated October 12, 1994. This Court has jurisdiction under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

Railway Labor Act:

Section 2 Fourth, 45 U.S.C. § 152 Fourth:

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for purposes of this Act. * * * *

Section 2 Ninth, 45 U.S.C. § 152 Ninth:

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representative in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the em-

ployees who may participate in the election. The Board shall have access to and shall have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purpose and provisions of this paragraph.

Administrative Procedure Act:

5 U.S.C. § 701(a):

> This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

5 U.S.C. § 704:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of final agency action. * * * *

STATEMENT OF THE CASE

The Railway Labor Act (RLA) governs labor-management relations in the railroad and airline industries. Under § 2 Fourth, the "majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class," 45 U.S.C. § 152 Fourth. Under § 2 Ninth, the National Mediation Board ("NMB") has the "duty . . . upon request of either party to the dispute" to investigate "any dispute . . . among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of" the Act; and, if the NMB determines after an investigation by any "appropriate

method" that the majority of a craft or class have chosen a representative, it shall "certify the same to the carrier" which "shall treat with the representative so certified as the representative of the craft or class under the RLA." 45 U.S.C. § 152 Ninth.

As construed by the NMB from its outset in 1934, the appropriate craft or class for representation extends to all employees in the craft or class throughout a carrier system, including where two or more technically separate carriers are operated as a single system.[1] In *Switchmen's Union* v. *Board*, 320 U.S. 297 (1943), this Court held that the courts do not have jurisdiction to review the merits of that interpretation and its application by the NMB to certify a system-wide representative. When one carrier is merged into or acquired by another, existing certifications on components of the merged system do not reflect a choice by a majority of the merged craft or class as § 2 Fourth requires; thus, any pre-merger representative no longer has been "designated and authorized in accordance with the requirements of" the Act as § 2 Ninth requires.

Section 2 Ninth empowers the NMB "to obtain" from the carriers and to "utilize such information as may be deemed necessary by it to carry out the purposes and provisions of" that secton; and otherwise is silent as to the extent, if any, to which a carrier may participate in the determination of representation issues under § 2 Ninth. This Court has concluded that "[w]hether and to what extent carriers will be permitted to present their views on craft or class questions is a matter that the Act leaves solely in the discretion of the Board," in holding that carriers did not have a statutory right to be a party to a proceeding under § 2 Ninth. *Railway Clerks* v. *Em-*

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[1] See First Annual Report of the National Mediation Board (1935) at 22. The relevant provisions in §§ 2 Fourth and Ninth were enacted, and the NMB was established, by 1934 amendments to the RLA. 48 Stat. 1185, 1186-89, 1193-95.

ployees Assn, 380 U.S. 650, 666-67 (1965). At one time, the NMB did not permit a carrier to request an investigation of a representation dispute. "This practice greatly limited the representation questions brought to the Board's attention to those raised by the labor organizations." *Grand Trunk W. R.R.,* 17 N.M.B. 282, 298 (1990).

As the unions on merged carriers often were content to retain pre-merger representation rights rather than risk a system-wide determination, a merged carrier dealt with multiple employee representatives who did not purport to speak for, or have authority to bind, all of the employees in the system-wide craft or class. When mergers began to occur in the airline industry, the NMB reexamined this matter and concluded that "a long history of mergers and acquisitions" in the railroad industry had resulted in a "pattern of representation" that "has, in the Board's judgment[,] led to uneven representation, duplication of effort, and confusion; and has significantly reduced the ability of the railroads to integrate operations and manage a single rail system." *Republic Airlines,* 8 N.M.B. 49, 54-55 (1980). This subsequently was exemplified by the chaotic pattern of representation on the Burlington Northern Railroad ("BN") revealed by the investigation that is the subject of one of the two consolidated appeals in the court below. See pp. 7-8, *infra.*

In *Republic Airlines,* the Board held that "all certifications" for representation of Airwest employees "were extinguished by operation of law upon Airwest's acquisition by Republic." 8 N.M.B. at 56. Some air carriers thereafter determined that NMB certifications had been extinguished by an operational merger, and several courts of appeals "held that the question whether a union's certification survives [a] . . . merger is a matter within the exclusive jurisdiction of the NMB." *Association of Flight Attendants* v. *Delta Air Lines,* 879 F.2d 906, 912 (D.C. Cir. 1989), *cert. denied,* 494 U.S. 1065 (1990), citing cases. The Board made clear that it had not intended to

give the carriers "independent authority to extinguish existing certifications," as it "has *exclusive* authority to grant, withhold and revoke representation certifications." *Trans World Airlines/Ozark Airlines*, 14 N.M.B. 218, 233, 235 (1987) (original emphasis). But the Board also recognized a need for "new procedures governing representation issues in mergers and acquisitions," and prescribed interim procedures under which "carriers involved in a merger, acquisition or consolidation will be permitted to invoke the Board's services for determination of whether any NMB certifications have been terminated." *Id.* at 241-42.

After soliciting and considering comments by interested persons, the NMB adopted permanent Airline Procedures on July 31, 1987, in *Procedures for Handling Representation Issues Resulting From Mergers, Acquisitions or Consolidations in the Airline Industry*, 14 N.M.B. 388; and the permanent Railroad Procedures, on November 27, 1989, that are at issue in this case. For the most part, those procedures are identical. Among other things, the carriers are required to "notify" the NMB when an application for approval of a merger is filed with the applicable regulatory agency (the ICC as to the railroads), and rail carriers "which have previously merged may notify the NMB that the merger[s] had occurred." App. F at 96a. Incumbent unions may file written comments, the NMB investigates in the form required by the circumstances and, if it determines that an operational merger will occur or has occurred, proceeds to determine representation of the system-wide crafts or classes. See App. F at 97a-98a.

In its decision with respect to representation on the BN, which also is involved here, the NMB determined that the BN consisted of 11 formerly independent railroads which now constitute a single transportation system; and that no certifications had been issued as to the BN itself but approximately 85 ("dating from 1934 to

1976") had been issued on one or more predecessors of the system. All certifications on the predecessor railroads were extinguished and, since the Board was able to determine that a majority exists in each craft or class, it certified a named union to represent each such craft or class on a system-wide basis. See App. H at 114a-115a, 122a-129a.

Respondents sought to invalidate the Railroad Procedures in a suit against the NMB alleging that jurisdiction existed under 28 U.S.C. §§ 1331 and 1337(a); the NRLC and the BN intervened as defendants; and the District Court dismissed the complaint as involving "precisely the kind of dispute that is within the unreviewable discretion of the NMB" under *Switchmen's Union* and its progeny. App. D at 83a-86a. Respondents filed a separate action against the NMB with regard to the application of those Procedures on the BN; the BN intervened as a defendant; and the District Court dismissed the complaint "for the reasons expressed" in the other case. App. G at 103a-106a. The appeals from those decisions were consolidated by the Court of Appeals, and a panel reversed the decisions by the District Court and "remanded for the entry of declaratory judgments for appellants consistent with [its] opinion," over a dissent by Judge Williams. App. C at 70a.

After granting rehearing *en banc*, the full Court of Appeals issued the 5 to 4 decision that this Court is here requested to review. In what is denominated as the Opinion for the Court, Judge Edwards concluded that the *Switchmen's Union* doctrine, as interpreted in *Leedom* v. *Kyne*, 358 U.S. 184, 189-90 (1958), did not preclude judicial review since "the Merger Procedures present a question of the Board's very jurisdiction—a question that is analytically distinct from and *antecedent to* the issue of whether the Board has correctly found the 'fact' of representation." App. A at 12a (emphasis in the original). In a "concurrence" joined by all five members of

the majority, Judge Randolph concluded that "the APA and not *Switchmen's,* controls" review of the Procedures. App. A at 32a. Although *"Switchmen's* interpreted the Railway Labor Act to bar judicial review of Board adjudications," in his view "that interpretation and the reasons behind it do not reach the Board's rulemaking in this case." App. A at 33a.

On the merits, Judge Edwards concluded for the majority that "the Board may investigate a representation dispute *only* upon request of the employees involved in the dispute" and that for the Board to do so either at the request of a carrier or *sua sponte* "is for the Board blatantly to exceed its statutory authority." App. A at 16a (emphasis in the original). The majority refused to give any deference to the NMB's interpretation because, in its view, " 'Congress has directly spoken to the precise question at issue' " in the case " 'so there is no gap for the agency to fill.' " App. A at 29a. Judge Randolph "fully agree[d]" with this aspect of the Edwards opinion. App. A at 34a.

The Court remanded the case arising from the adoption of the Railroad Procedures "for entry of declaratory and injunctive relief in favor of appellants"; and remanded the case arising from the application of those procedures on the BN "for reconsideration in light of the new judgment" in the other case. App. A at 30a. The dissenters understood that this disparity was because Judge Randolph's concurrence basing reviewability upon the Administrative Procedure Act (APA), with his "distinction between rulemaking and adjudication," governed the "outcome" of that issue. App. A at 35a.

REASONS FOR GRANTING THE WRIT

The NRLC is an unincorporated association whose members include most of the nation's Class I railroads, which it represents in collective bargaining with unions representing their employees, and with respect to other labor relations issues of concern to the railroads generally. All of the major railroad systems are the end product of prior mergers and acquisitions, but the unions often have insisted that the merged system bargain with a general chairman representing only employees on a premerger component of the system, pursuant to a pre-merger certification, even where the same union had been certified or recognized on each such predecessor of the system. As the NMB concluded, the resulting fragmentation of representation "led to uneven representation, duplication of effort, and confusion; and has significantly reduced the ability of the railroads to integrate operations and manage a single rail system." See p. 6, *supra*.

Because the validity of the NMB's Merger Procedures thus is of great importance to the NRLC and member railroads, the NRLC intervened as a defendant below in the suit seeking to invalidate those procedures. The decision invalidating those procedures raises important issues that should be reviewed by this Court. Those issues affect the airline industry as well as the railroad industry and have even broader implications as we show below. Before doing so, however, we demonstrate that the decision conflicts with the *Switchmen's Union* doctrine as established and applied by this Court and as applied by other appellate courts including the Sixth Circuit in the only other appellate decision involving the Merger Procedures, and is otherwise erroneous.

I. THE MERITS OF THE NMB'S REPRESENTATION PROCEDURES ARE NOT JUDICIALLY REVIEWABLE.

The *Switchmen's Union* doctrine was reaffirmed and applied by this Court, in the light of *Leedom* v. *Kyne* and the APA, in *Railway Clerks* v. *Employees Assn, supra.*

Neither the reason asserted by Judge Edwards nor the reason asserted by Judge Randolph for avoiding the application of that doctrine here and reviewing the merits of the merger procedures can withstand examination in the light of those decisions by this Court.

A. The "Jurisdictional" Approach by Judge Ewards Conflicts With the *Switchmen's* Union Doctrine as Applied by This Court and Other Appellate Courts.

Judge Edwards concluded that, because § 2 Ninth imposes a duty upon the NMB to investigate a representation dispute upon request of a party to a dispute, the Board does not have "jurisdiction" to investigate at the request of a carrier or *sua sponte*; and that *Switchmen's Union* does not preclude review of such "jurisdictional" issues.[2] This is flatly contrary to *Switchmen's Union*, which involved a similar issue. In that case the NMB, after an investigation, determined that the New York Central and certain railroad subsidiaries constituted a single system, certified a representative of a system-wide craft, and terminated representation by another union on parts of that system. That union contended that "the two lines" on which it represented employees were "separate carriers" as that term is defined in the RLA, and thus for purposes of § 2 Ninth which, in terms, provides for investigation of disputes "among a carrier's employees," and for certification of a representative "to the carrier." In effect, therefore, the union contended that the Board did not have jurisdiction to certify a representative for a multi-carrier system-wide craft. See *Switchmen's Union of N. America* v. *National M. Board*, 135 F.2d 785, 788-89 (D.C. Cir. 1943), *rev'd*, 320 U.S. 297 (1943), which reached the merits of that contention and concluded that the NMB had not abused its discretion.

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[2] But see *Pro. Cabin Crew Ass'n* v. *National Mediation Bd.*, 872 F.2d 456, 460 (D.C. Cir.), *cert. denied*, 493 U.S. 974 (1989) (a "negative implication" from affirmative statutory language does not cross "this lofty threshold" for judicial review under the *Switchmen's Union* doctrine).

This Court held, however, that the courts do not have power to "reach the merits of the controversy" and review the action of the NMB. 320 U.S. at 300. The Court of Appeals similarly erred here. The fundamental issue in both cases was whether procedures adopted by the NMB for the exercise of its jurisdiction under § 2 Ninth violated that provision. Of course, a court that concludes that the NMB erred can always say that the Board exceeded its "jurisdiction." As Judge Williams stated, in "the absence of a manageable line between jurisdictional and other issues, non-deference for 'jurisdictional' issues is just a tag for the court's conclusion." App. A at 40a. Such an approach in effect nullifies the *Switchmen's Union* doctrine and should have been rejected by the court below as it was by this Court in *Switchmen's Union*. Indeed, other appellate courts have applied that doctrine even where coverage by the RLA is in issue.[3]

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[3] The RLA expressly defines "carrier" and "employee" as "used in" and "for the purpose of" the Act. 45 U.S.C. §§ 151 First and Fifth. The Second Circuit applied the *Switchmen's Union* doctrine to review of determinations by the NMB as to whether an individual is an "employee" eligible to vote in a representation election under § 2 Ninth, in *Virgin Atlantic Airways* v. *Nat. Mediation Bd.*, 956 F.2d 1245, 1250-51 (2d Cir.), *cert. denied*, 113 S. Ct. 67 (1992). *Accord*, *Pro. Cabin Crew Ass'n* v. *National Mediation Bd.*, *supra*, 872 F.2d at 459-63. The Seventh Circuit applied that doctrine to review of a determination by the NMB that a company was a "carrier" subject to § 2 Ninth. *Chicago Truck Drivers, Etc.* v. *Nat. Mediation Bd.*, 670 F.2d 665, 669-70 (7th Cir. 1981). But see *Delpro Co.* v. *Brother. Ry. Carmen of U.S. & Canada*, 676 F.2d 960, 962-63 (3d Cir.), *cert. denied*, 459 U.S. 989 (1982); *International Long. Ass'n* v. *North Carolina Ports Auth.*, 463 F.2d 1, 3 (4th Cir. 1972), *cert. denied*, 409 U.S. 982 (1972). See, also, *United States* v. *Feaster*, 410 F.2d 1354, 1359-64 (5th Cir.), *cert. denied*, 396 U.S. 962 (1969). Plainly, determinations of whether a company or individual comes within the coverage of the RLA are more "jurisdictional" in nature than determinations by the NMB as to the scope or manner of exercising its powers under § 2 Ninth with respect to covered carriers and employees.

Leedom v. *Kyne* does not change that conclusion. The relationship between the *Switchmen's Union* and *Leedom* v. *Kyne* doctrines was explained by this Court in *Railway Clerks*, 380 U.S. at 659-60, as follows:

> It is sometimes said that in *Leedom* v. *Kyne* . . . , the Court created an 'exception' to the doctrine of *Switchmen's Union*. . . . But this was no exception to *Switchmen's Union*. Rather the Court was careful to note that '[t]his suit is not one to "review," in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a *specific prohibition in the Act*' (original emphasis).

Here, the NMB adopted its merger procedures as an exercise of its jurisdiction under § 2 Ninth, which does not contain a "specific prohibition" of an investigation by the Board of a representation dispute either at the request of a carrier or *sua sponte*. The fact that review also may be available under *Leedom*, if an agency violates "a specific affirmative command," does not mean that where a prohibition is in issue, as here, it need not be specific (see App. A at 9a and p. 15, *infra*.).

B. The APA Approach by Judge Randolph Conflicts With the *Switchmen's Union* Doctrine as Applied by This Court and Other Appellate Courts and Misapplies the APA.

Judge Randolph's approach to reviewability is equally erroneous. Under that approach, *Switchmen's Union* applies only to review of certifications by the NMB, and thus has no application at all to review of the merger procedures adopted by the Board—which thus are reviewable under § 704 of the APA. That approach is unpre-

cedented, substantially eviscerates *Switchmen's Union*, and misapplies the APA.[4]

In *Switchmen's Union*, the Board's certification was claimed to be invalid only because of the claimed invalidity of its procedure to investigate and certify on a system-wide basis. The Court concluded that the right of a majority of a craft or class to select a representative was "protected by § 2, Ninth, which gives the Mediation Board the power to resolve controversies concerning it" and did not provide for judicial review. 320 U.S. at 300-01. The Court reiterated "our conclusion" in a companion case, *General Committee* v. *M.-K.-T. R. Co.*, 320 U.S. 323, 333 (1943), "that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate." 320 U.S. at 302. The Court considered (and rejected) the "fact that the certificate of the Mediation Board is conclusive" as a possible "ground for judicial review," not as a deterrent to such review. 320 U.S. at 303.

As the court below once concluded, therefore, "*a fortiorari* if the district courts have no jurisdiction to review both a determination of craft or class and a certification, as in the *Switchmen's Union* case, they have no jurisdiction to review a craft or class determination alone." *United Transp. Serv.* v. *National Mediation Board*, 179

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[4] Judge Randolph appears to concede that, if the *Switchmen's Union* doctrine is applicable, the APA is inapplicable. Section 701(a) of the APA excepts from review thereunder agency action as to which "statutes preclude review" or that "is committed to agency discretion by law." *Switchmen's Union* established that the RLA precludes review of actions by the NMB under § 2 Ninth and committed protection of the § 2 Fourth right to the discretion of the NMB. As the dissent below noted (App. A at 36a-37a), *Switchmen's Union* was cited in the Attorney General's Manual on the Administrative Procedure Act (1947) as an example of "the category classified as unreviewable under the APA." *Accord, Virgin Atlantic Airways* v. *Nat. Mediation Bd., supra*, 956 F.2d at 1250.

F.2d 446, 450 (D.C. Cir. 1949). So, too, the Second Circuit rejected an "attempt to distinguish the *Switchmen's* case on the basis that there has as yet been no certification," in *Ruby* v. *American Airlines, Inc.*, 323 F.2d 248, 253 (2d Cir. 1963), *cert. denied*, 376 U.S. 913 (1964). Judge Randolph's conclusion that *Switchmen's Union* does not apply to review of the Board's merger procedures is irreconcilable with that decision as well as with the basis for the *Switchmen's Union* decision.

Moreover, this Court's decision in *Railway Clerks* demonstrates that the APA did not supplant or limit the *Switchmen's Union* doctrine. The district court had enjoined use of the form of ballot prescribed by the NMB in its rules for an election under § 2 Ninth, in an opinion which was adopted by the Court of Appeals. *Association for Ben. of Non-Contract Emp.* v. *National Med. Bd.*, 218 F. Supp. 114 (D.D.C. 1963), *aff'd per curiam on basis of opinion below sub. nom. United Airlines, Inc.* v. *National Mediation Board*, 330 F.2d 853 (D.C. Cir. 1964), *aff'd*, 380 U.S. 650 (1965). According to that opinion, "a fundamental change had been brought about by the enactment, subsequent to Switchmen's Union, of the" APA so as to permit review of NMB actions under § 2 Ninth that raise "serious issue[s] of statutory construction," 218 F. Supp. at 124-25. This Court reversed, without even bothering to mention the APA, with the "principles in mind" of *Switchmen's Union* and *Leedom* v. *Kyne*. 380 U.S. at 658-60. "Unable to point to any specific requirement for a 'no union' ballot in the Act," the respondents were "left to arguing in terms of policy and broad generalities as to what the Railway Labor Act should provide," which "are matters for Congress and the Board rather than the courts." 380 U.S. at 671.

Even if applicable, § 704 of the APA provides for review of agency action "made reviewable by statute and final agency action"; and further provides that "preliminary, procedural, or intermediate agency action or ruling

not directly reviewable is subject to review on the review of the final agency action." The NMB's Merger Procedures are "procedural" agency action that is preliminary or intermediate to the application of those procedures in a certification investigation. No one is affected by those procedures until they are applied, so they are not " 'ripe' for judicial review under the APA" until applied in a final certification decision. See *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 891-92 (1990). Thus, Judge Randolph's distinction between "adjudication" and "regulation," for purposes of review under the APA, ignores the language of § 704 and the "ripeness" doctrine.[5]

C. Subsequent Legislative Developments Confirm This Court's Conclusion in *Switchmen's Union* that Congress Did Not Intend Judicial Review.

This Court's *Switchmen's Union* decision was "reinforced by the highly selective manner in which Congress has provided for judicial review of administrative orders or determinations under the Act." 320 U.S. at 305. "When Congress in §§ 3 and 9 [of the RLA] provided for judicial review of two types of orders or awards and in § 2 of the same Act omitted any such provision, it drew a plain line of distinction. And the inference is strong from the history of the Act that that distinction was not inadvertent." 320 U.S. at 306. That inference has been strengthen by subsequent developments.

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[5] Both the NMB and the NRLC contended in the district court that the validity of the Merger Procedures was not ripe for review, if reviewable at all, until and in the context of review of a certification thereunder (see App. D at 84a), citing *United States* v. *Feaster*, 410 F.2d 1354, 1364 (5th Cir.), *cert. denied*, 396 U.S. 962 (1969); *American Air Export & Import Co.* v. *O'Neill*, 221 F.2d 829, 830 (D.C. Cir. 1954), among others. See, also, *Chicago Truck Drivers* v. *Nat. Mediation Bd.*, *supra*, 670 F.2d at 668-69. After the application of the procedures on the BN was attacked in a separate action and the appeals were consolidated, that contention appeared to be mooted until revived by Judge Randolph's distinction.

The provision in § 3 First for judicial review of arbitration awards was part of the same 1934 amendments that enacted § 2 Ninth. That provision authorized review only of monetary awards against a carrier, and did not authorize review of awards rejecting a claim or grievance. In *Union Pacific R. Co.* v. *Price*, 360 U.S. 601, 615-16 (1959), the Court held that the "disparity in judicial review . . . was explicitly created by Congress, and it is for Congress to say whether it ought to be removed." In a 1966 amendment, Congress provided for judicial review of such arbitration awards for both carriers and claimants, but limited to three specified grounds. 80 Stat. 208, 211; see 45 U.S.C. § 153 First (p) and (q). In *Union Pacific R. Co.* v. *Sheehan*, 439 U.S. 89, 93-94 (1978), the Court held that "this statutory language means just what it says" so that an award was not reviewable except "for the three reasons specified" in the amended statute.

In thus amending the judicial review provisions of the RLA, Congress did *not* provide for any judicial review of actions by the NMB under § 2 Ninth or otherwise disturb the then established *Switchmen's Union* doctrine that the merits of such actions are not reviewable.[6] This sequence of events and this Court's decisions with respect thereto is a further confirmation "that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate." See p. 14, *supra*. Both Judge Edwards and Judge Randolph, for the majority below, ignored that conclusion.

D. The Decision Below Conflicts With a Decision by the Sixth Circuit.

The majority decision below also conflicts with the only other appellate decision that involved the Merger Procedures. *Brotherhood of Maint. of Way Emp.* v.

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[6] A similar pattern of Congressional action was said to be "persuasive evidence of the adoption by that body of the judicial construction." *Missouri* v. *Ross*, 299 U.S. 72, 75 (1936).

Grand Trunk, 961 F.2d 1245 (6th Cir. 1992). The NMB applied those procedures to certify system-wide representatives on the Grand Trunk system, and some of those unions sued for a declaratory judgment that the Grand Trunk nonetheless was required to bargain with General Committees on components of the merged system with respect to that part of the craft or class within the jurisdiction of a particular Committee. When the district court issued such a declaration, the Grand Trunk both appealed and petitioned the NMB to clarify its prior decision. The Board explained that it "envisioned that the Carrier and labor organizations would not continue to bargain along the lines of the extinguished certifications on the former lines," and had certified a "single representative for the entire system-wide craft or class on the GTW in order to enable bargaining to proceed along the newly-defined craft or class lines." *Grand Trunk W. R.R.*, 19 N.M.B. 226, 231-33 (1992).

The Sixth Circuit reversed the district court and remanded with directions to dismiss the unions' complaint with prejudice. 961 F.2d at 1250. It concluded, among other things, that the carrier's petition to the NMB was a "proper procedure," and that "the Board correctly determined that the matter presented to it in this case was a representation dispute, exclusively within its jurisdiction" so that the Board's decision was not reviewable under the *Switchmen's Union* doctrine. 961 F.2d at 1248-50. Hence, by certifying "the union that is the single representative for each craft or class of workers system-wide," the Board "has resolved the only dispute." 961 F.2d at 1250. This decision is incompatible with the majority decision below reviewing and invalidating the very procedures applied and clarified by the NMB in that case.[7]

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[7] The Airline Procedures were held to be unreviewable in *Teamsters* v. *NMB*, 136 L.R.R.M. 2193 (D.D.C. 1990). Cf., *Western Airlines Inc.* v. *Teamsters*, 480 U.S. 1301, 1305-07 (1987) (O'Connor, J., in Chambers), and cases there cited.

II. EVEN IF THE MERITS ARE REVIEWABLE, THE DECISION BELOW IS ERRONEOUS.

The majority of the Court of Appeals concluded that the plain language of § 2 Ninth so clearly precludes an NMB investigation of a representation dispute at the request of a carrier or *sua sponte* that the Board's determination to the contrary is not entitled to any deference by the courts. However, the fact that § 2 Ninth imposes upon the NMB a *duty* to investigate "upon request of either party to the dispute," does not speak to the issue of whether the Board in its discretion may permit a carrier to be a party to an investigation under § 2 Ninth, or to the power of the Board to act *sua sponte* to investigate the effects of a merger on representation of the resulting system-wide crafts or classes. As this Court stated in *American Trucking* v. *A., T. & S. F. R. Co.*, 387 U.S. 397, 411 (1967), there is "no basis for this vast leap from a particular authorization to a pervasive prohibition" such as was engaged in by the majority below.[8]

Moreover, the NMB is expressly empowered to obtain from the carriers "such information as may be deemed necessary by it to carry out the purposes and provisions" of § 2 Ninth. The Merger Procedures implement that authority by providing for carrier notification of mergers

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[8] This was true in *American Trucking* even though the agency had changed an interpretation it had maintained "for over 25 years"—that "railroad concurrence is essential for trucker use of TOFC services." 387 U.S. at 415. An agency "faced with new developments or in the light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. . . . In fact . . . , this kind of flexibility and adaptability . . . is an essential part of the office of a regulatory agency." 387 U.S. at 416. Hence, the reliance by the majority below on the NMB's past practice (App. A at 26a-28a) adds nothing significant.

or proposed mergers and related information that the Board deems to be necessary to carry out the purpose of § 2 Ninth to certify employee representatives on a system-wide craft or class basis. Any doubt about the Board's discretionary authority in that regard should have been dispelled by this Court's *Railway Clerks* decision.

The Court there concluded that, as a carrier does not have a statutory right to participate in proceeding under § 2 Ninth, "[w]hether and to what extent carriers will be permitted to present their views on craft or class questions is a matter that the Act leaves solely to the discretion of the Board." 380 U.S. at 666-67. In that case, the Board had "requested, received and considered statements from the carrier," and had "continued to correspond with [the carrier,] accepting and studying its detailed application for reconsideration of the Board's decision. . . ." 380 U.S. at 666. The majority below simply ignored this aspect of *Railway Clerks*. If the Board has discretion to authorize a carrier to petition for reconsideration of its decision in an investigation, surely it also has discretion to authorize a carrier to request an investigation. The decision to the contrary by the majority below clearly is wrong.

Moreover, it is most unlikely that Congress intended to preclude the NMB from acting *sua sponte* to assure that its certifications continue to comply with the requirements of the Act, as § 2 Ninth commands, even though notified that a merger has made that at least questionable in regard to pre-merger certifications. After all, as this Court stated in *Switchmen's Union* and reiterated in *Railway Clerks*, the purpose of § 2 Ninth is to protect the right, under § 2 Fourth, "of the 'majority of any craft or class of employees' to 'determine who shall be the representative of the craft or class for the purposes of this Act.'" 380 U.S. at 659; 320 U.S. at 300-01. The validity of the Board's long-standing interpretation that such craft representation should be system-wide was not

questioned by respondents or by the court below. In the face of the burgeoning merger movement in the airline industry and upon reconsideration of the consequences of mergers in the railroad industry, the Board concluded that leaving to the unions the invocation of a representation investigation had undermined rather than protected the right of the majority of the employees in a system-wide craft to determine the representative of that craft or class. See p. 6, *supra*.

This Court stated in *American Trucking Assns* v. *United States*, 344 U.S. 298, 311 (1953), that it "is an unnatural construction of the Act which would require the Commission to sit idly by and wink at practices that lead to violations of its provisions." We submit that it also "is an unnatural construction" of the RLA that would require the NMB "to sit idly by and wink at" evasions of the requirement in § 2 Fourth that representation certifications reflect the choice of the majority of the employees in a system-wide craft or class. The fact that Congress, when it enacted § 2 Ninth in 1934, chose without any explanation not to enact a much different bill for investigation of representation disputes between a carrier and its employees (see App. A at 21a-22a) does not demonstrate that the Congress intended to preclude a carrier from invoking or otherwise participating in an investigation of representation disputes among employees, or to preclude the NMB from investigating such disputes *sua sponte*. "The interpretation of statutes cannot safely be made to rest upon mute intermediate legislative maneuvers." *Trailmobile Co.* v. *Whirls*, 331 U.S. 40, 61 (1947). *Accord, Mead Corp.* v. *Tilley*, 490 U.S. 714, 723 (1989). But however, that may be, the *Railway Clerks* decision is sufficient in itself to demonstrate that the majority below erred in holding that the NMB does not have discretion to permit such participation by a carrier.

III. THE ISSUES ARE IMPORTANT.

We have already noted the importance of the Merger Procedures to collective bargaining in the railroad industry. See p. 10, *supra*. If the railroads cannot invoke an investigation of a representation dispute, presumably the airlines cannot do so either and the majority decision below also will lead to invalidation of the Airline Procedures as well, unless reversed by this Court. As Judge Williams noted (App. A at 38a), airline associations expressed concern as *amici* below that invalidation of the Airline Procedures would cast a cloud over the numerous applications of those procedures in the airline industry, could "dispute the stable post-merger collective bargaining relationships now in place," and would be even more significant as to the future since, before those procedures, carrier decisions "frequently resulted in unresolved disputes, litigation and potential disruption of airline operations." Fragmentation of system-wide crafts or classes into multiple bargaining units correspondingly multiplies the number of bargaining disputes that may lead to strikes disrupting rail or airline transportation.

Moreover, heretofore it has been "a truism," since *Switchmen's Union*, "that decisions and determinations of the National Mediation Board in resolving representation disputes under Section 2 Fourth and Ninth are discretionary and essentially unreviewable by the courts." *The Railway Labor Act at Fifty* (G.P.O. 1977), at 29. The double evisceration of the *Switchmen's Union* doctrine, by the "jurisdiction" approach of Judge Edwards and the "APA" approach of Judge Randolph thus undermines what hitherto has been the keystone to the determination of representation disputes under the RLA—the unreviewable discretion of the NMB. Unless reversed by this Court, the decision below will encourage other judicial challenges of NMB decisions with consequent delays in the finality of representation determinations. Hence, the decision below has importance outside of merger representation issues as well as with respect to those issues.

So, too, the expansive interpretation by Judge Edwards of *Leedom* v. *Kyne*, and the view expressed by Judge Randolph for the majority that agency procedures or regulations may be reviewed under the APA even though applications of those procedures or regulations are not reviewable, could affect the reviewability of actions by agencies other than the NMB and thus have widespread application.

We submit, therefore, that the majority decision by the Court of Appeals has decided "important question[s] of federal law" that should be "settled by this Court" as well as deciding them "in a way that conflicts with applicable decisions of this Court" and of other appellate courts. Rule 10.1(c) of this Court.

CONCLUSION

A writ of certiorari should be granted to review the *en banc* decision by a 5 to 4 majority of the Court of Appeals below.

Respectfully submitted,

RICHARD T. CONWAY
(Counsel of Record)
RALPH J. MOORE, JR.
EUGENIA LANGAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

DAVID P. LEE
Vice Chairman and
General Counsel
NATIONAL RAILWAY LABOR
CONFERENCE
1901 L Street, N.W.
Washington, D.C. 20036
(202) 862-7218

Attorneys for the National Railway Labor Conference

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